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No. 871

In the Supreme Court of the United States

MINORU YASUI,

APPELLANT,

vs.

UNITED STATES OF AMERICA,

APPELLEE.

Certified from the United States Circuit Court of Appeals for the Ninth Circuit by Order of the Supreme Court of the United States, so that the whole matter in controversy may be considered and decided as on appeal.

APPELLANT'S BRIEF

E. F. BERNARD,
Spalding Building,
Portland, Oregon,

RALPH E. MOODY,
Guardian Building,
Salem, Oregon,

Counsel for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND

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Certified from the United States Circuit Court of Appeals for the Ninth Circuit by Order of the Supreme Court of the United States, so that the whole matter in controversy may be considered and decided as on appeal.

APPELLANT'S BRIEF

The opinion of the District Court of the United States for the District of Oregon, adjudging the defendant guilty, United States of America v. Minoru Yasui, is reported in 48 F. Supp. 40. An appeal was taken to the United States Circuit Court of Appeals for the Ninth Circut which, after argument, certified two questions to this Court. This Court, on its own

motion, ordered the entire record sent up so that it might consider and decide the whole matter in controversy.

STATEMENT OF THE CASE

The appellant was indicted in the District Court of the United States for the District of Oregon for a violation of Public Proclamation No. 3 of the Western Defense Command and Public Law No. 503, 77th Congress, approved March 21, 1942. He entered a plea of not guilty, waived a trial by jury, and elected to be tried by the Court. He was convicted and sentenced to pay a fine of Five Thousand Dollars and be imprisoned for a term of one year. Public Law No. 503 is codified as 18 U.S.C.A., Section 97A, and the indictment is set forth on pages 2-6 of the record.

At the conclusion of all the evidence in the case, the appellant interposed a motion for a verdict and judgment of not guilty, which raised the question of the sufficiency of the indictment and of the evidence, and the validity of the statute and proclamation mentioned above, and of Executive Order 9066. The appellant contended, among other things, that the proof showed he was a citizen of the United States of America and that the law, Executive Order, and proclamation mentioned were void as to citizens.

The court overruled the appellant's motion, holding that the regulation was void as to citizens of the United States but finding that the appellant was not

a citizen of the United States but a subject of the Emperor of Japan.

Exceptions were duly saved by the appellant to the ruling of the court denying the motion for a verdict and judgment of acquittal, and to the findings of the court to the effect that the appellant was not a citizen of the United States but a subject of the Emperor of Japan, and objected and excepted to the court imposing any sentence in the case. The exceptions were allowed by the court. (R. 88-90)

On February 19, 1942, the President of the United States issued Executive Order No. 9066. This order appears in 7 F.R. 1407, and is as follows:

> "Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U.S.C., Title 50, Sec. 104):
>
> "Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or

desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restrictive areas.

"I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops

and other Federal Agencies, with authority to accept assistance of state and local agencies.

"I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities and services.

"This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder."

On March 2, 1942, the Western Defense Command, by Public Proclamation No. 1 (7 F.R. 2320), established Military Areas Nos. 1 and 2, and, on March 24, 1942, issued Proclamation No. 3 (7 F.R. 2543), which is as follows:

"HEADQUARTERS
WESTERN DEFENSE COMMAND
and FOURTH ARMY
Presidio of San Francisco, California

PUBLIC PROCLAMATION NO. 3

March 24, 1942.

"TO: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

"WHEREAS, by Public Proclamation No. 1, dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2 and Zones thereof, and

"WHEREAS, by Public Proclamation No. 2, dated March 16, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5 and 6 and Zones thereof, and

"WHEREAS, the present situation within these Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones thereof:

NOW THEREFORE, I, J. L. DEWITT, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, West-

ern Defense Command, do hereby declare and establish the following regulations covering the conduct to be observed by all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the Military Areas above described, or such portions thereof as are hereinafter mentioned:

1: From and after 6:00 A.M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as those areas are defined and described in Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5, and 6, as those areas are defined and described in Public Proclamation No. 2, dated March 16, 1942, this headquarters, or within any of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P.M. and 6:00 A.M., which period is hereinafter referred to as the hours of curfew.

2. At all other times all such persons shall be only at their place of residence or employment or traveling between those places or within a distance of not more than five miles from their place of residence.

3. Nothing in paragraph 2 shall be construed to prohibit any of the above specified persons from visiting the nearest United States Post Office, United States Employment Service Office, or office operated or maintained by the Wartime Civil Control Administration, for the purpose of transacting any business or the making of any arrangements reasonably necessary to accomplish evacuation; nor be construed to prohibit travel under duly issued change of residence notice and travel permit provided for in paragraph 5 of Public Proclamations Numbers 1 and 2. Travel performed in change of residence to a place outside the prohibited and restricted areas may be performed without regard to curfew hours.

4. Any person violating these regulations will be subject to immediate exclusion from the Military Areas and Zones specified in paragraph 1 and to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled 'An Act to Provide a Penalty for violation of Restrictions or Orders with respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zone.' In the case of any alien enemy, such person will in addition be subject to immediate apprehension and internment.

5. By subsequent proclamation or order there will be prescribed those classes of persons who will be entitled to apply for exemptions from exclusion

orders, hereafter to be issued. Persons granted such exemption will likewise and at the same time also be exempted from the operation of the curfew regulations of this proclamation.

6. After March 31, 1942, no person of Japanese ancestry shall have in his possession or use or operate at any time or place within any of the Military Areas 1 to 6 inclusive, as established and defined in Public Proclamations Nos. 1 and 2, above mentioned any of the following items:

(a) Firearms.
(b) Weapons or implements of war or component parts thereof.
(c) Ammunition.
(d) Bombs.
(e) Explosives or the component parts thereof.
(f) Short-wave radio receiving sets having a frequency of 1,750 kilocycles or greater or of 540 kilocycles or less.
(g) Radio transmitting sets.
(h) Signal devices.
(i) Codes or ciphers.
(j) Cameras.

Any such person found in possession of any of the above named items in violation of the foregoing will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled 'An Act to Provide a Penalty for Violation of Restrictions or Orders with

Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zone.'

7. The regulations herein prescribed with reference to the observance of curfew hours by enemy aliens, are substituted for and supersede the regulations of the United States Attorney General heretofore in force in certain limited areas. All curfew exemptions heretofore granted by the United States Attorneys are hereby revoked effective as of 6:00 a.m., PWT, March 27, 1942.

8. The Federal Bureau of Investigation is designated as the agency to enforce the foregoing provisions. It is requested that the civil police within the states affected by this Proclamation assist the Federal Bureau of Investigation by reporting to it the names and addresses of all persons believed to have violated these regulations.

J. L. DEWITT
Lieutenant General, U. S. Army
Commanding."

It was admitted at the trial that on the date mentioned in the indictment the defendant wilfully failed to remain in his place of residence between the curfew hours. He contended, however, that he was a citizen of the United States of America by birth, that he had never lost that citizenship, and that the law and proclamation which he was charged with violating could constitutionally have no application to citizens of the United States of Japanese ancestry.

SPECIFICATION OF THE ASSIGNED ERRORS TO BE RELIED UPON

Assignment No. 1. (R. 218) The court erred in overruling the defendant's motion for a directed verdict of not guilty and for a verdict and judgment of not guilty for the reason and upon the ground that the defendant is and at all times has been a citizen of the United States of America and because the regulations which he is charged with having violated are void as to citizens of the United States of America and void as to citizens of United States of America of Japanese ancestry and particularly the defendant in that they deprive such citizens and the defendant of life, liberty and property without due process of law and in that the regulations are discriminatory in contravention of the Fifth Amendment to the Constitution of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien but alleges facts from which it appears that he is and at all times has been a citizen of the United States of America.

Assignment No. 2: (R. 218) The court erred in finding that the defendant is not a citizen of the United States of America for the reason and upon the ground that the evidence in the case is beyond dispute that the defendant is and at all times has been a citizen of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien

but alleges facts from which it appears that he is a citizen of the United States.

Assignment No. 3: (R. 219) The court erred in finding that the defendant was a citizen of Japan for the reason and upon the ground that there is no evidence in the case upon which such a finding can be based and for the further reason that the indictment does not charge that the defendant is a citizen of Japan or an alien but alleges facts from which it appears that the defendant is and at all times has been a citizen of the United States of America.

Assignment No. 4: (R. 219) The court erred in not finding that the defendant is and at the time of the commission of the acts charged in the indictment was and at all other times was a citizen of the United States of America, for the reason and upon the ground that the evidence is beyond dispute that the defendant has at all times been a citizen of the United States of America and for the further reason and upon the further ground that there is no evidence that the defendant has ever been a citizen of any country other than the United States of America and for the further reason and upon the further ground that the indictment alleges that the defendant is a citizen of the United States of America.

Assignment No. 5: (R. 219-220) The court erred in overruling the defendant's objection to the imposing of any sentence against him for the reason and upon the ground that the indictment in the case does not charge that the defendant is or was an alien but al-

leges facts sufficient to show that the defendant at all times has been a citizen of the United States of America.

SUMMARY OF THE ARGUMENT

The indictment alleges that the appellant "is a person of Japanese ancestry; that he was born at Hood River, Oregon, on the 19th day of October, 1916." If the regulation which the appellant is charged with violating is void as to citizens the indictment does not charge an offense. It does not charge that the appellant is an alien Japanese and cannot support a finding that he is such. United States v. Standard Brewery, 251 U.S. 210, 220; Harris v. United States, 104 F. (2d) 41, 43-45.

The evidence in the case was beyond dispute that the appellant was born in the United States of alien parents who had a permanent residence and domicile in the United States. The parents were carrying on business in the United States and were not in the diplomatic service. Under the Fourteenth Amendment to the Constitution the appellant was a citizen of the United States from the time of his birth. United States v. Wong Kim Ark, 169 U.S. 649; 8 U.S.C.A. 800.

The evidence in the case was beyond dispute that the appellant continued to reside and have his domicile in the United States from the time of his birth. He was not, by international or other law, a citizen of Japan or a subject of the Emperor of Japan. United

States v. Wong Kim Ark, supra; Moore, International Law, Vol. 3, p. 518; 12 Harvard Law Review, 55-56; 8 U.S.C.A. 800.

If the appellant ever was required to make an election as to citizenship, the oath of allegiance which he took on arriving at the age of majority was irrevocable and final. Moore, International Law, Vol. 3, pp. 545-546.

A citizen of the United States may be expatriated only when and in the manner permitted by law. 8 U.S.C.A. 801.

The government must exercise the war power within the constitution, not in defiance of it. Ex Parte Milligan, 71 U.S. 2, 121; Highland v. Russell Car Co., 279 U.S. 253, 261; Hamilton v. Kentucky Distilleries, 251 U.S. 146, 155-156; United States v. Cohen Grocery Co., 255 U.S. 81, 88.

The existence of war does not suspend the operation of the Fifth and Sixth Amendments of the Constitution of the United States relating to personal equality, due process of law, and the taking of private property for public use. Ex Parte Milligan, supra; United States v. Cohen Grocery Co., supra; United States v. Bernstein, 267 Fed. 295, 296.

Neither Congress nor the President may constitutionally delegate to the military a legislative power over civilians in the absence of a declaration of martial law. Ex Parte Milligan, supra; United States v. Yasui, 48 F. Supp. 40.

Emergency does not create power or diminish constitutional restrictions. Home Building Assn. v. Blaisdell, 290 U.S. 398, 426; Schechter v. United States, 295 U.S. 495, 528.

Qualified martial law cannot exist. Bishop v. Vandercook, 228 Mich. 299, 200 N.W. 278; 67 C.J. p. 425.

That the Fifth Amendment does not contain an equal protection clause does not mean that there may not be a discrimination of such an unjust character as to bring into operation the due process clause. Currin v. Wallace, 306 U.S. 1, 14.

Equality is guaranteed by the due process clause. Truax v. Corrigan, 257 U.S. 312, 332.

The restraint imposed upon legislation by the due process clauses of the Fifth and Fourteenth Amendments are the same. Heiner v. Donnan, 285 U.S. 312, 326; Coolidge v. Long, 282 U.S. 582, 596.

A law or regulation which forbids citizens of one ancestry or color to do things which citizens of another ancestry or color are permitted to do or which selects a particular race or nationality for oppressive treatment does not afford due process of law or equal protection of the law. Buchanan v. Warley, 245 U.S. 60; Truax v. Raich, 239 U.S. 33, 39; Yick Wo v. Hopkins, 118 U.S. 356; Yu Chong Eng, et al. v. Trinidad, et al., 271 U.S. 500; Missouri, ex rel. Gaines v. Canada, 305 U.S. 337; Skinner v. Oklahoma, 316 U.S. 535, 541; Re opinion of Justices, 207 Mass. 601, 94 N.E. 558.

ARGUMENT

The Indictment Does Not Charge That Appellant is an Alien Japanese

Public Proclamation No. 3 purports to require all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing within the geographical limits described to be in their places of residence between the hours of 8:00 P.M. and 6:00 A.M., which period is referred to as the hours of curfew. It is apparent from the proclamation that alien Japanese considered as a class distinct from persons of Japanese ancestry, and that persons of Japanese ancestry are not included in the classification relating to alien Japanese, or at least not necessarily so.

The indictment does not charge that the defendant is an alien Japanese, but the allegation is "that Minoru Yasui is a person of Japanese ancestry; that he was born at Hood River, Oregon, on the 19th day of October, 1916". Citizenship being the rule and alienage the exception, the presumption would be, from the allegation of birth in the United States, that appellant is a citizen of the United States. If the contention of the appellant is correct, as the District Court found, that the law, order, and proclamation made the basis of the indictment are void as to American citizens of Japanese ancestry, then to charge a crime it is necessary to state facts from which the court can draw a conclusion as a matter of law that appellant is an alien Japanese. An indictment must be direct and certain as to the

crime charged and the particular facts and circumstances when such are necessary to a completed offense. All the material facts and circumstances embraced in the definition of the offense must be stated in the indictment and the omission of any essential element cannot be supplied by intendment or implication. United States v. Standard Brewery, 251 U.S. 210, 220. Allegations of essential elements of a statutory offense are matters of substance and not of form and their omission is not aided or cured by verdict. Harris v. United States (C.C.A. Mo. 1939), 104 F. (2d) 41, 43-45.

It cannot be said from an inspection of the indictment that the defendant is an alien Japanese. As the indictment does not so allege, it cannot be made the basis of a finding that the appellant is an alien Japanese.

The Evidence in the Case Required a Finding That Appellant is a Citizen of the United States of America

The appellant was born in the United States of America at Hood River, Oregon, on the 19th day of October, 1916. (Government Ex. 7, R. 77, 148.) At that time his father was engaged in business at Hood River as a merchant and his mother was a housewife, and both of his parents were residents and inhabitants of that place. Neither of the parents were in the diplomatic service of any country. (Def. Ex. 10, R. 82.) The appellant, therefore, on his birth became a citizen

of the United States of America. "All persons born * * * in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside". Amendment XIV, Constitution of the United States. A person born in the United States of alien parents who are regularly domiciled in the United States and who are not engaged in diplomatic service is a citien of the United States. U. S. v. Wong Kim Ark, 169 U.S. 649; Morrison v. California, 291 U.S. 82, 85. The opinion of the trial court (R. 46-47), while admitting the fact of appellant's citizenship by birth, says:

(Page 54, 48 F. Supp.)

> "By international law however he was also a citizen of Japan and subject of the Emperor of Japan. According to international law, also, he had, upon attaining majority but not before, the right of election as to whether he would accept citizenship in the United States or give his allegiance to the Emperor . . . ."

No reference or authority is quoted in support of the first statement. In support of the second, cases are cited where children born in this country of alien parents were taken by the parents to their native land and where the children, by reason of years of residence in such land, became subject to the jurisdiction thereof. A third case is cited where a person naturalized in this country returned to his native land and reassumed his allegiance to it. The appellant denies that by international law he was a citizen of Japan or

a subject of the Emperor of Japan, denies that according to international law he had, upon attaining majority, the right of election as to whether he would accept citizenship in the United States or give his allegiance to the Emperor, and asserts that at all events, if he was required to make an election, he at all times elected to be and remain a citizen of the United States by repeated acts and by most solemn declarations.

Allegiance is a necessary concomitant of citizenship. Double allegiance arises from the conflict of two nations each superior within its own borders. The conflict is obviated by the rule that the liability of the child to the performance of the duties of allegiance is determined by the laws of that one of the two countries in which he actually is. Moore, International Law, Vol. 3, Sec. 425, p. 518. In the cases referred to by the trial court, the foreign nation could assert its citizenship law by reason of the individual's residence within its borders. Such is not this case, for the appellant and his parents have continuously resided within the United States of America. It is a well established principle of public law that the municipal laws of a country have no effect within the limits of another power, beyond such as the latter may think proper to concede them. Moore, International Law, Vol. 3, Sec. 374, p. 283. At all times during his minority, the appellant was a citizen of the United States. Letter of Frelinghuysen, Secretary of State, Moore, International Law, Vol. 3, Sec. 428, p. 532.

There is no evidence in the case as to the law of Japan. Although the law of that country could have no application within the United States, yet it is evident that, before a question of double allegiance could arise, there must have been two claims for allegiance. If the country to which the parents belong does not claim the allegiance of the foreign born children of its citizens no question of double allegiance can arise. Moore, International Law, Vol. 3, Sec. 425, p. 518. There is no evidence in this case that either the Government of Japan or the Emperor of that country claimed the allegiance of the appellant or that the laws of Japan would have authorized such a claim.

The question of double allegiance does not arise by international law but by the concurrent operation of two different laws.

> "Citizenship is a question not of international but of municipal law. The division of the law of citizenship into the jus sanguinis and the jus soli is a deduction from the division of the jurisdiction of a State into the personal and the territorial. In the civil law, citizenship is by descent. At common law, all those born within the kingdom of legeance of the crown were held subjects; and if the United States have a common law this ancient rule governs. Calvin's Case, 7 Rep. 1. Whatever abstract rules there may be, the right of every sovereignty to determine for itself by its own laws who are its citizens is a fundamental one. By the Fourteenth Amendment of the United States Con-

stitution 'all persons born or naturalized within the United States are citizens;' the exception is that those not born 'subject to jurisdiction thereof' are not citizens. Are the children of aliens within the exception? When within our territory, the sovereigns, the diplomats, sailors upon ships of war, and soldiers in the organized military forces of a foreign state, are not subject to our jurisdiction. Children born of parents under these circumstances of extra-territoriality would not be citizens. The same is true of the children born to tribal Indians. The logic of these exceptions of sovereignity, however, does not apply to the alien subject domiciled in the United States. He is subject to the territorial jurisdiction; his children are born subject to our jurisdiction; and these, by our municipal law, are citizens . . ." 12 Harvard Law Review, 55-56.

The opinion of the trial court on the question of appellant's citizenship is contrary to the reasoning of the court in United States v. Wong Kim Ark, supra. In that case the court had for determination the citizenship of one who had been born in the United States of alien Chinese parents domiciled here. By the government it was contended that children born here of alien parents took the citizenship of the parents and, therefore, were not "subject to the jurisdiction" within the meaning of the Fourteenth Amendment. The historical background of the amendment was thoroughly explored and in the course of its opinion the court said:

(Page 662, 169 U.S.)

"In United States v. Rhodes (1866), Mr. Justice Swayne, sitting in the Circuit Court, said: 'All persons born in the allegiance of the King are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England. . . . . We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution.'" 1 Abb. (U.S.) 28, 40, 41.

(Page 666, 169 U.S.)

"It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law, as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations. . . ."

In rejecting this contention the court said:

(Page 667, 169 U.S.)

"There is, therefore, little ground for the theory that, at the time of the adoption of the 14th Amendment of the Constitution of the United

States, there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.

"Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own Constitution and laws, what classes of persons shall be entitled to its citizenship."

The Court quoted from an opinion of Justice Marshall in the case of The Exchange, 11 U.S. 7, Cranch, 116, as follows:

(Page 683, 169 U.S.)

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitations not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. . . . ."

It is a contemptible concession to the power of any foreign government to say that such government can

command allegiance to it from a person not only born in the United States but a continual resident and inhabitant of it. It is a pernicious doctrine which asserts that a child born in the United States of alien parents regularly domicilied therein who continues, with his parents, to remain a resident and inhabitant of the United States, owes any allegiance to the land of his parents or has an inchoate right of citizenship in it during his minority. It permits a foreign government to add a proviso to the Fourteenth Amendment to the Constitution of the United States. It demands of all citizens of the United States born of alien parentage duties of election heretofore unknown. No natural born citizen of the United States can owe any allegiance to or have citizenship in any foreign government unless he has voluntarily expatriated himself in the manner provided by law. The existence of this kind of dual citizenship has been repudiated by the United States. Title 8, Sec. 800, U.S.C.A., is as follows:

> "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas its is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of pub-

lic peace that this claim of foreign allegiance should be promptly and finally disavowed; Therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic."

The appellant reached the age of majority on October 19, 1937. O.C.L.A., Sec. 63-501. The record of his birth was filed with the Oregon State Board of Health and was never recorded any other place. (R. 150) His father continued in business at Hood River, Oregon, throughout the years, and his mother continued to there reside as a housewife. The only time the appellant has been outside of the United States, with the exception of four hours spent in Mexico, was in 1925, when he was taken on a short vacation trip to Japan. (R. 151-152) He never resided in any foreign country. (R. 153) He attended the public schools in Hood River, and entered the University of Oregon in 1933, receiving his Bachelor of Arts Degree in 1937. (R. 153-154) While attending the University of Oregon, he took a military course which unquestionably was not compulsory. He completed this course in June, 1937. As he had not then attained the age of majority he was not granted his commission in the United States Army until December, 1937, at which time, having reached the age of majority, he took the oath of allegiance to the United States of America. (R. 174) If an election as to citizenship was necessary, here it was made in

the most solemn form. When such an election is made it is final. Moore, International Law, Vol. 3, Sec. 430, pp. 545-546. In June, 1939, appellant completed his law course at the University of Oregon. He returned to Hood River County and worked in the summertime as a ranch hand and, in September of 1939, passed the bar examinations and was admitted to practice in the State of Oregon. (R. 155) To secure his license it was necessary that he be a citizen of the United States of America and that he take an oath of office to support the Constitution and laws of the United States. Sections 47-302 and 47-306, O.C.L.A.

He never took an oath of allegiance to any country save the United States of America, and exercised the rights of citizenship by voting in the State of Oregon. (R. 154, 157)

The appellant's parents are Methodists (R. 196), and the only Japanese organizations with which appellant is connected are the Japanese Methodist Church and the Japanese-American Citizens' League. (R. 178, 196) Neither the appellant nor his parents give adherence to the principles of Shinto, and appellant has never accepted the divine pretensions on the part of the Emperor of Japan. (R. 194-196)

After admission to the bar, appellant practiced law until April, 1940. At that time he secured employment as a secretary in the office of the Consulate-General of Japan at Chicago, Illinois. Along with all other employees, he was required to be registered with the Secretary of State at Washington, D.C., and in his

registration his nationality was given as United States citizen. (R. 59) His salary was $125.00 per month, and his duties consisted of opening and answering mail and making speeches before civic clubs. He had hoped to bring about better relations between the United States and Japan. (R. 181-182), did nothing detrimental to the United States of America (R. 191), and there is no evidence that during the time he was employed by the Consulate-General's office he did any act or said anything inconsistent with his citizenship in or allegiance to the United States. (R. 151) A citizen of the United States can expatriate himself only in the manner provided by law (Title 8, Sec. 801, U.S.C.A.), and the appellant did nothing which would bring about his expatriation. (R. 172-174)

On December 8, 1941, appellant resigned his position in the Consulate-General's office, because he felt that as a loyal American citizen he could not be working for the Japanese Consulate after the declaration of war. (R. 160) He immediately and repeatedly offered to go into active service in the United States Army. (R. 84-86) Under date of March 28, 1942 (R. 85, 86), he was notified that a physical disability, defective vision, would be waived for limited service, and that he would be retained in the Infantry Reserve with eligibility for limited service only.

The appellant's employment by the Consulate-General's office is one of the two things to which reference is made in the opinion of the trial court as the basis for a finding that appellant is a citizen of Japan.

Title 8, Section 801, subdivision d, U.S.C.A. provides that a United States citizen shall lose his nationality by accepting or performing the duties of any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible. It is not claimed that the duties of appellant's employment could only be performed by Japanese nationals. Other American citizens were employed in the department. The record in the case lacks any evidence that appellant's duties required him to do anything inimical to the interests of the United States or anything contrary to the oath of allegiance to the United States which he had taken over two and one-half years before. If he had been able to carry out his desire to preserve friendly relations between his country and Japan, he would have earned the gratitude of all Americans. That he was unable to do so is no reason for depriving him of the American citizenship which is his birthright.

The other circumstance referred to by the trial court is that in 1940 appellant's father received some recognition from the government of Japan. The only evidence in the record is that such recognition was given because of the work appellant's father had performed in promoting better relations between the Japanese and Americans in the Hood River Valley. If the Government contended that such recognition was granted for more sinister reasons and that a penalty should be visited on the son, it should have been

in a position to produce what it claimed to be the facts. Instead, it produced nothing. Innuendo is not evidence. It is in the record, however, that on the night of December 8, 1941, appellant received a telegram from his father reading as follows: "As war has started your country needs your services as a United States Reserve Officer. I as your father strongly urge you to respond to the call immediately". (R. 83, 131)

The right to citizenship in the United States is precious to the appellant, but the question raised on this feature of the case goes far beyond his own personal interests. In this country are millions of persons born here of alien parentage who know no other country. The appellant is one of them. These people from early childhood have learned in the schools to daily "pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one nation indivisible, with liberty and justice for all". They have been taught that the United States is the one country where all men are born equal and where no person will ever be discriminated against because of religion, race, or color. They have learned that this and this alone is their country. To them double allegiance and the right of election between conflicting citizenships are unknown. This country should reject any idea that a child born here of alien parentage, who remains with his parents until reaching the age of majority, owes the faintest trace of allegiance to any foreign government or can deny allegiance to the country that has sheltered, protected, and educated him from the cradle to manhood.

The effect of the decision of the trial court is to deprive the appellant of the right of citizenship which he acquired by birth, in contravention of the Fourteenth Amendment to the Constitution.

Executive Order No. 9066

This order, issued February 19, 1942, contains a preamble reciting that the successful prosecution of the war requires every possible protection against aspionage and against sabotage to national defense material, national defense premises and national defense utilities as defined by statute. It then vests in the Secretary of War and such Military Commanders whom he may from time to time designate, whenever he or any designated commander deems such action necessary or desirable, authority to prescribe Military areas in such places and of such extent as he or the proper military Commander may determine, from which any or all persons may be excluded and with respect to which the right of any person to enter, remain in or leave shall be subject to whatever restrictions the Secretary of War or the proper Military Commander may impose in his discretion. The Secretary of War and the proper Military Commanders under the order may take such steps as he or they may deem advisable to enforce compliance with the restrictions in any military area, including the use of Federal troops.

When this proclamation was issued, the United States was engaged in a great war. It is said by the

Government and it is no doubt true that there was a possibility that the Pacific Coast states might be attacked by hostile force. The Government was entitled to exercise all of its great war powers under the constition, and those charged with the duty of carrying on the war would have been derelict in duty had they failed to do so.

The operation of the Constitution of the United States, however, had not been suspended. The Government was exercising its war powers under the Constitution, not in defiance of it. Ex parte Milligan, 71 U.S. 2, 120; Highland v. Russell Car Co., 279 U.S. 253, 261; Hamilton v. Kentucky Distilleries, 251 U.S. 146, 155-156; U. S. v. Cohen Grocery Co., 255 U.S. 81, 88. Martial law had not been declared. Congress was in daily session. All executive branches of the Government were functioning and the sittings of the Federal judiciary were uninterrupted. None of the states of the Pacific Coast were under siege. No part was occupied by a hostile force. The civil authorities of all of these states were functioning as uninterruptedly as in time of peace.

In view of the situation then existing, Executive Order No. 9066 and the scope of the authority attempted to be delegated by it challenge attention. It was proposed that the country be divided into military areas by Military Commanders unnamed, these military areas to be wherever and of such areas as the Military Commanders might deem either necessary or desirable. These Military Commanders in their sole

discretion were to have power to say not only who could enter and leave the areas and under what conditions but under what restrictions all persons could remain. Complete dictatorial powers were granted without limit and with full authority to define the territorial extent of the jurisdiction so to be exercised. The grant of power to a Military Commander to fix the location and boundaries of the military area and the conditions under which persons may remain in such area is total subjection of civilians to unrestrained military command and void under the doctrines announced in Ex Parte Milligan, supra, to which more detailed reference will be made.

Public Proclamation No. 3

This proclamation singles out American citizens of Japanese ancestry, places them in the same category as alien Japanese, alien Germans, and alien Italians, and requires them to be in their place of residence during the hours of curfew. It was issued by the Western Defense Command under the authority of Executive Order No. 9066 for the alleged purpose, as recited in the Executive Order, of preventing espionage and sabotage. Aside from the illegality of the proclamation, a more complete insult to a group of American citizens could not have been devised.

Those from other countries of the world who settled in the United States did so for a chance to make homes and work in a free country governed by just laws which promise equal protection to all who abide

by them. Ex parte Kawato, 317 U.S. 69, 71. The Japanese who settled in the United States are known to be industrious and law-abiding people. The farms which they tilled were models of husbandry, and their markets were patronized by white people generally with no thought of race prejudice. That they are a law-abiding people appears from the infrequent mention of their names in the criminal reports. They of course were wont to associate among themselves, as did the Chinese, and the aliens from every country in the world who sought haven in the United States.

They brought into the world children, as did those children, with a birthright of American citizenship in the United States. Allegiance was demanded and, in return, the protection of equal laws was guaranteed. These children were raised in the public schools with children of all races. The principles of American government were instilled in them and they were taught the glories and traditions of American history. They took on the language, dress, and customs of the ordinary American and no doubt dreamed the same ideals. Many have fought in the armies of the United States and at this moment thousands are offering their lives for the country of their birth. It is doubtful if a handful of those charged with the enforcement of the proclamation here involved could distinguish between the ordinary American citizens of Japanese and Chinese ancestry.

The Government has argued that American citizens of Japanese ancestry have not been assimilated into

American life and for that reason they might be more apt to have a trace of loyalty to the Emperor of Japan which would cause them to commit acts of sabotage or espionage. From what has been said and from what the Court must know of its own knowledge, the Japanese-Americans have been assimilated into the American life; of course not completely so, any more than the Chinese or negroes. However, they have all taken their places in the pattern of American life. Repressive measures at times have been taken against these races and these repressive measures are now pointed to as a reason why peoples of these races have not been assimilated. Patriotism does not spring from color or race. By the same argument, in days to come the Government may argue that the Japanese-Americans have not been assimilated into American life because during World War II they were locked up in concentration camps. The fault is ours, not theirs.

It has not been claimed by the Government that there were any acts or attempted acts of sabotage on the part of American citizens of Japanese ancestry which called for any such repressive measures as Public Proclamation No. 3. It has not been claimed by the Government that there were any arrests of American citizens of Japanese ancestry for such activities. The Government must be forced to contend, therefore, that Public Proclamation No. 3 is justified because the military commander thought that among the thousands of Americans of Japanese ancestry there might possibly be some who would be inclined to sabotage or

espionage and therefore it was proper to restrict all so that an unnamed, unnumbered, speculative few might be deterred.

A plausible reason can always be advanced by a government as an excuse for the suppression of a minority. The usual one is suspicion of disloyalty, advanced in Europe to justify imprisonment and murder. In its brief, filed in the Court of Appeals, the Government pointed to German created evacuated areas along the Dutch and French Coasts as an argument that the United States should possess the power to evacuate citizens of Japanese ancestry. We are not engaged with Germany in a contest of brutality toward civilians. If the authority claimed by the Government in this case cannot be found in the Constitution, it should not be exercised in an effort to emulate Hitler.

Ex Parte Milligan

In this case a citizen of the United States who had been tried, convicted and sentenced to death by a military court for conspiracy and subversive measures against the Federal government, applied for habeas corpus. He was a citizen of the State of Indiana which, although it had been previously invaded and was threatened with invasion, was not at the time under occupation by any hostile troops. The opinion deals exhaustively with the law of civil and military power and, after setting forth the provisions of the Fourth, Fifth and Sixth Amendments to the Federal Constitution, the Court said:

(Pages 120-121, 71 U.S.)

"* * * These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious

consequences, was ever invented by the wit of men than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of neecssity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

Answering the claim that the jurisdiction complained of was justifiable under the laws and usages of war the Court, among other things, said:

(Pages 124-125, 71 U.S.)

"If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within the limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

"The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every gauarantee of the Constitution, and

effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irrenconcilable and, in the conflict, one or the other must perish.

"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.

"If our fathers had failed to provide for just such a contingency, they would have been false to the trust imposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporat-

ing in a written constitution the safeguards which time has proved were essential to its preservation. Not one of those safeguards can the President or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus."

The Milligan case was cited with approval in Sterling v. Constantin, et al., 287 U.S. 378, 402. That case was a suit to enjoin the Governor of the State of Texas, the Adjutant General of the State, and the Bridagier General of the Texas National Guard from enforcing certain military or executive orders. The executive and military orders were based on a proclamation of the Governor stating that certain counties were in a state of insurrection, tumult, riot, and a breaching of the peace, and declared martial law. The court held that the allowable limitations of military discretion and whether or not they have been overstepped in a particular case are judicial questions, and, after citing the Milligan case and quoting from that portion of it which we have set out above, the Court sustained the issuance of an injunction against the defendant.

In the Milligan case, it appears that the Military granted Milligan a trial, although by court martial; in this case no hearing was granted to the appellant or any of the American citizens of Japanese ancestry to be affected by the proclamation.

The Opinion of the District Court

The District Court has held Public Proclamation No. 3 void as to American citizens and its decision follows as of necessity from the principles announced in Ex Parte Milligan, supra, which for over three quarters of a century have stood as a bulwark protecting civilians from military rule.

The court held that there should be no disposition, either in peace or war, to wear away the fundamental guarantees of liberty of the individual; that a military commander has no right to legislate and pass statutes to be enforced by the civil courts; that a military commander has no power to issue regulations binding on citizens in civil life in the absence of a declaration of martial law; that there is no such thing as partial martial law; that the proclamations and regulations of a military commander cannot be enforced in the civil courts; that congress could not make constitutionally a distinction relating to the conduct of citizens based on race; and that Congress could not make acts of citizens criminal simply because such acts were in violation of orders to be issued in the future.

No useful purpose would be served here by repeating the citations to be found in the opinion of the District Court. In the Court of Appeals, the Government sought to evade the force of the opinion by arguing that the proclamation, law and order here involved were a valid exercise of the war powers of Congress and of the President.

The War Power

Earlier in this brief the war power and the necessity for the exercise of it are recognized. The Government has heretofore cited a number of cases dealing with the extent of that power. An examination of those most prominently mentioned discloses that none of them support the legality of the law, order, and proclamation here involved. All of them, either by implication or express declaration, recognize, as do Ex Parte Milligan, supra, United States v. Cohen Grocery Co., supra, and United States v. Bernstein, supra, that the existence of war does not suspend the guarantees of the Fifth and Sixth Amendments to the Constitution relating to personal equality, due process of law, and the taking of private property for public use. These amendments were written shortly after the American Revolution by men who had taken part in it, and it is significant that it was not written that no person should be deprived of life, liberty, or property without due process of law except in time of war. The prohibition against such governmental action is without any express limitation.

The Government has referred to a class of cases dealing with the power to fix prices in time of war, of which Highland v. Russell, 279 U.S. 253, 258, 261-262, is a fair selection. That case involved the validity of the Lever Act which authorized the President to fix the price of coal, and the Court recognized that even in time of war property could not be taken without due process of law. The Court said:

(Pages 258, 261-262, 279 U.S.)

"Plaintiff does not claim that the amount paid by defendant was not compensatory or that it did not give him a reasonable profit or that the value of the coal was greater than the prices fixed by the President * * *.

"Under the Constitution and subject to the safeguards there set forth for the protection of life, liberty and property (Ex Parte Milligan, 4 Wall. 2, 121; Hamilton v. Kentucky Distilleries, 251 U.S. 146, 151; United States v. Cohen Grocery Co., 255 U.S. 81, 88), the Congress and the President exert the war power of the nation, and they have wide discretion as to the means to be employed successfully to carry on * * *."

The operation of the Fifth Amendment is recognized in those cases dealing with the rent laws such as Block v. Hirsch, 256 U.S. 135, 157, where it is said: "Machinery is provided to secure to the landlord a reasonable rent".

Likewise in cases involving the right of the Government to seize and operate utilities in time of war—cables and railroads—such as Commercial Cable Co. v. Burleson, 255 F. 99, 107, and Northern Pacific Ry. Co. v. North Dakota, 250 U.S. 135, 144-145. In the Commercial case it was pointed out that adequate provision was made for compensation to be fixed in the first instance by the President but with right of appeal to the Court of Claims. Adequate provision for com-

pensation was also made in the laws relating to seizure and operation of the railroads.

Even those cases which recognize the right of the Government in time of war to entirely suppress those evils which in time of peace it is within the province of the states to suppress, it is recognized that the war power is subject to constitutional limitations. The Government has the right in time of war to prohibit the sale of intoxicating liquors, Hamilton v. Kentucky Distilleries, supra, and to prevent the maintenance of houses of prostitution in the vicinity of army camps, McKinley v. United States, 249 U.S. 397, for the same reason that the states may take similar action in times of peace. The proposition is aptly stated in the Hamilton case:

(Pages 156-157, 251 U.S.)

". . . The war power of the United States, like its other powers, and like the police power of the states, is subject to applicable constitutional limitations (Ex Parte Milligan, 4 Wall. 2, 121-127; Monongahila Navigation Co. v. United States, 148 U.S. 312, 336; United States v. Joint Traffic Ass'n., 171 U.S. 505, 571; McCray v. United States, 195 U.S. 27, 61; United States v. Cress, 243 U.S. 316, 326); but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power. In re Kemmler, 136 U.S. 436, 448; Carroll v. Greenwich Ins. Co., 199 U.S. 401, 410. If the nature and conditions of a restriction upon

> the use or disposition of property is such a state could, under the police power, impose it consistently with the Fourteenth Amendment, without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation, for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency."

It is submitted that no state, under the Fourteenth Amendment, could justify a law requiring all citizens of Japanese ancestry to remain within their homes during curfew hours even though the law had been enacted because of a suspicion that some of those in that class might be inclined to commit criminal offenses. The Fifth Amendment likewise restricts the Federal government in time of war.

In Schenck v. United States, 249 U.S. 47, 51-52, the factual situation should be noted. In that case, the defendant had been indicted for conspiracy to violate the Espionage Act, conspiracy to use the mails for transmission of nonmailable matter, and use of the mails for the transmission of the same matter. He attempted to justify under the First Amendment—free speech. The Court held that the character of the words and the circumstances under which they have been uttered must be considered, and said "the most stringent protection of free speech would not protect a man in falsely shouting 'Fire' in a theatre and causing panic". This case can have no application here where the ap-

pellant was not charged by the Western Defense Command with doing anything.

Reference is made by the Government to various cases discussing the power to deal with alien enemies in time of war. The plenary power of the Government with respect to this class of persons is conceded. In the Prize Cases, 67 U.S. 635, the Court held that all persons residing within the territory occupied by the hostile power are liable to be treated as enemies and that a ship leaving one of the ports in the occupied territory after a blockade had been declared and after the expiration of the time allowed for neutrals to leave was subject to seizure. United States v. MacIntosh, 283 U.S. 605, 615, was a naturalization proceeding wherein it appeared that the applicant would not bear arms in defense of this country if he was admitted to citizenship, and it was held that naturalization is a privilege to be given or withheld as Congress may determine. The Alien Property Custodian Law was involved in Central Trust Co. v. Garvan, 254 U.S. 554, 567, and it was noted that provision was made for any claimant to establish his right to the property.

Various miscellaneous cases have been cited, none of which would seem to support the claim of power made in the case at bar. Respublica v. Sparhawk, 1 Dal. 357, decided in the year 1788, held that during the American Revolution the Continental Congress had the right to direct removal of articles useful to the enemy and in danger of falling into their hands, and that the owner of the property so removed was not entitled

to compensation if the property was afterward captured by the enemy. In Raymond v. Thomas, 91 U.S. 712, 715-716, an officer in command of the armed forces of the United States assumed to annul a decree of the state courts. The Court said:

> "It was an arbitrary stretch of authority, needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question we are not called upon to decide. It is an unbending rule of law that the exercise of military power where the rights of citizens are concerned, shall never be pushed beyond what the exigency requires. Mitchell v. Harmony, 13 How. 115; Warden v. Bailey, 4 Taunt. 67; Fabrigus v. Moysten, 1 Comp. 161; s.c., 1 Smith's L.C. pt. 2 p. 934."

Hamilton v. Dillin, 88 U.S. 73, was an action to recover from the surveyor of the Port of Nashville, Tennessee, charges paid for permits to purchase and ship cotton to the loyal states, and it was held that the Government has the right to permit limited intercourse with the enemy under such conditions as it sees fit, such as payment of the charges involved. In Miller v. United States, 11 Wall. 268, 305, the Confiscation Acts passed during the Civil War were involved, and the court held that the power to declare war included the right to seize and confiscate all property of an enemy and dispose of it at the will of the captor. In United States v. Sweeney, 157 U.S. 281, an action by an officer to recover pay, the only question involved was

whether service in a volunteer regiment was service in the Army of the United States within the meaning of an applicable statute. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 326, involved the authority of the Federal government to construct a dam as a means of assuring abundant electric energy for the manufacture of munitions of war.

In the Court of Appeals the Government pointed to the Selective Draft Law cases, 245 U.S. 366, as presenting a factual situation most similar to that of the case at bar. In those cases the court was dealing with an Act of Congress, here with a proclamation of the military authorities; there it was considering the constitutional power to raise armies, it being said that "as the mind cannot conceive of an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice"; here, this Court is dealing with a claim on the part of the Government that it has the right to confine, on suspicion and without accusation or hearing, citizens of the United States merely because of ancestry. Allegiance demands a willingness to defend the country, not an abject submission to confinement on suspicion. Would it be said that a Selective Service Act which provided that American citizens of Japanese ancestry, and no others, or of Swedish ancestry, and no others, or of Scotch ancestry, and no others, or of Jewish ancestry, and no others, would be subject to induction into the army, was a constitutional

exercise of the war power?

It is submitted that the war power of the Government— whether of Congress or the President—does not justify the law, order, and proclamation here in question and that the cases heretofore before this Court lend no support to the contention that it does. Emergency does not create power nor diminish constitutional restrictions. Home Building Ass'n. v. Blaisdell, 290 U.S. 398, 426; Schechter v. United States, 295 U.S. 495, 528.

Due Process—Racial Discrimination

The most pernicious vice inherent in Proclamation No. 3 of the Western Defense Command is that the provisions of it are directed to citizens of Japanese ancestry alone and classifies them with alien enemies. It is a classification based solely on race.

In the brief filed before the Circuit Court of Appeals, the Government said "the distinction is based not on the mere fact that these persons were of Japanese ancestry but on the facts that such persons have cultural and family ties which render it likely that among them will be found the persons who would help this particular enemy which was likely to attack the area in which they resided". This is sophistry run riot. The proclamation is directed not against those who because of family ties might assist the enemies of the United States but against persons of Japanese ancestry.

The Fifth Amendment does not contain an equal protection clause, but this does not mean that there may not be a discrimination of such an unjust character as to bring into operation the due process clause of the Fifth Amendment. Currin v. Wallace, 306 U.S. 1, 14. A classical outline of the requirements of due process is found in Truax v. Corrigan, 257 U.S. 312, 332:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general laws, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general laws which govern society. Hurtado v. Cal., 110 U.S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or the legislation may not withhold. Our whole system of law is predicated on the general fundamental plan of equality of application of the law. 'All men are equal before the law', 'This is a government of laws and not of men', 'No man is above the law', are all maxims showing the spirit in which legislators, executives, and courts are expected to make, execute and apply laws."

No discrimination could be more unjust to the individual or more dangerous to the welfare of the coun-

try than one against a particular group of citizens because of ancestry. A claim that the right to so discriminate exists is based on the premise that this is a nation composed of hyphenated citizens from all the countries of the world, and not of Americans. Such discrimination breeds distrust of a Government which proclaims equality but practices inequality. Those who today applaud race discrimination may tomorrow be subjects of it.

All persons within the jurisdiction of the United States shall have the same right in every state and territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like punishments, penalties, taxes, licenses and exactions of every kind, and no other. 8 U.S.C.A. 41. A law or regulation which forbids citizens of one ancestry or color to do things which citizens of another ancestry or color are permitted to do does not afford due process of law or equal protection of the law. Buchanan v. Warley, 245 U.S. 60; Truax v. Raich, 239 U.S. 33, 39; Yick Wo v. Hopkins, 118 U.S. 356; Yu Chong Eng, et al. v. Trinidad et al., 271 U.S. 500; Missouri ex rel. Gaines v. Canada, 305 U.S. 337; Re Opinion of the Justices, 207 Mass. 601, 94 N.E. 558. The restraint imposed upon legislation by the due process clauses of the Fifth and Fourteenth Amendments is the same. Heiner, Collector of Internal Revenue v. Donnan, 285 U.S. 312, 326; Coolidge v. Long, 282 U.S. 582. No duty presses more imperatively

upon the courts than the enforcement of those constitional provisions intended to secure the equality of each which is the foundation of free government. Gulf, Colo. & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 160.

The case of Yick Wo v. Hopkins, supra, involved ordinances of the City of San Francisco regulating the location and operation of laundries. Under the ordinances, any persons seeking to operate a laundry were required to obtain a license from a Board of Supervisors. The operation of the Supervisors under these ordinances was such that a large number of Chinese were denied the right to conduct laundries, while people of other nationalities in similar circumstances were granted licenses. In the course of its opinion, the Court said:

(Page 366, 118 U.S.)

"They" (the ordinances) "seem intended to confer and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places but as to persons" . . .

"The power granted to them is not confined to their discretion in the legal sense of the term, but is granted to their mere will. It is purely arbitrary and acknowledges neither guidance nor restraint."

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and

administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the constitution." Pages 373-4.

In Buchanan v. Warley, supra, the court said:

"That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights."

The rule which prohibits racial discrimination was succinctly stated in Re Opinion of the Justices, supra, as follows:

(Page 360, 94 N.E.)

"The fact that a man is white, or black, or yellow, is not a just and constitutional ground for making certain conduct a crime in him when it is considered permissible and innocent in a person of different color."

In a recent case, Skinner v. Oklahoma, 316 U.S. 535, 541, in considering the validity of a sterilization law, the court expressed itself on race discrimination. It said: "When the law lays an unequal hand on those who have committed intrinsically the same quality of

offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment".

The Government has heretofore referred to cases such as Cantwell v. Connecticut, 310 U.S. 296, Minnesota v. Probate Court, 309 U.S. 270, and Jacobson v. Massachusetts, 197 U.S. 11, in an effort to show that the curfew proclamation and the evacuation orders which followed it were not manifestly unreasonable and that therefore due process of law was not denied. In the Cantwell case, in speaking of the First Amendment to the Constitution, the Court said, "nowhere is this shield more necessary than in our country composed of many races and many creeds". The same may be said of the Fifth Amendment. In Minnesota v. Probate Court, there was under consideration the validity of a statute providing for the commitment of persons with psychopathic personalities. Full protection was granted to the persons coming within the statutory definition of psychopathic persons by way of hearings, as in insanity cases, and the law was general in its application. In Jacobsen v. Massachusetts, the Court was considering a general law requiring vaccinations where an epidemic existed. The inapplicability of these cases seems apparent without argument.

History should have taught us by now, the danger of permitting the military to govern the civil population, so long as the machinery of civil government is

functioning. If the lessons learned from the past are now to be forgotten and the wholesome doctrines of the Milligan case to be abandoned, at least the authority of the military should be confined to the issuance of general regulations applicable to all alike and not discriminatory proclamations such as here involved, which are based upon the false assumption that we are a divided instead of a united people.

CONCLUSION

The writers of this brief are not unaware that here and there among the thousands of American citizens of Japanese ancestry there may be found a few who might betray the land of their birth. Likewise, there undoubtedly are renegades among the alien Germans and Italians and even among American citizens of such ancestry who are permitted to be at large by the same military authority which confines American citizens of Japanese ancestry, and there may be those who would betray this country who can trace their ancestry back through four or five generations of American citizens.

The solution of such a problem, as said in Buchanan v. Warley, supra, cannot be promoted by depriving citizens of their constittuional rights. If there are officers of the government who believe that among the American citizens of Japanese ancestry disloyalty is so prevalent that it constitutes a menace to the safety of the country, the question should be brought into

the open, on the floor of Congress and before the people, so that the evidence may be examined, both sides heard and, if the situation requires a remedy, a constitutional one be speedily framed by the representatives of the people. No less should be required when it is proposed to deprive thousands of citizens of their liberties and the consequent loss of property which to many amounts to the savings of years.

The decision of such a question and the application of a remedy, if one is required, should not, and constitutionally cannot, be left to a military commander. History teaches that dictators, whether civil or military, are usually strong, not always wise, and frequently ruthless. Military commanders sometimes forget that they are soldiers. The slur that "a Jap is a Jap" may be often shouted in the hope that repetition may take the place of truth and hide the misery which has been caused and obscure the serious constitutional questions. The curfew law was the first assault on the constitutional rights of American citizens of Japanese ancestry but it was the initial one which led to the disgraceful situation where American citizens are staring through barbed wire barricades on this land of freedom. Recent European history should make plain to us the danger of wholesale proscription.

The appellant's case is not only the case of American citizens of Japanese ancestry, it is the case of all naturalized Americans, the case of all whose parents came to our shores for a haven of refuge. Indeed, it is a protect on behalf of all against racial discrimi-

nation of any kind, for the oppressors of today may be the oppressed of tomorrow. The attack on Pearl Harbor was a great act of treachery which should be repaid in the American way and not by petty acts of injustice or by stripping citizens of their most precious heritage.

Respectfully submitted,

E. F. BERNARD,
RALPH E. MOODY,
Counsel for Appellant